Supreme Court, U.S.
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No. 94-1729

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN M. O'QUINN,

Petitioner,

v.

DONNA C. KLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS FOURTEENTH COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Mr. O'Quinn may raise here now the questions he seeks to present:

a. in consideration of the absence of a complete record; or

b. in consideration of his having chosen to submit his post-Award complaints themselves to arbitration; or

c. in consideration of the waiver found by the court below.

2. Whether the Due Process Clause prohibits any award of punitive damages in any arbitration.

3. Whether, upon the record in this particular case, the Due Process Clause prohibits the award of punitive damages:

a. in consideration of the agreement between the parties; or

b. in consideration of the "pleadings" of Ms. Kline.

PARTIES TO THIS PROCEEDING

Petitioner is John M. O'Quinn, an attorney living and practicing law in the Houston, Texas area. He was a responding party in the arbitration below[1]; a defendant before the state trial court[2]; an appellee before the state intermediate appellate court[3]; and both a petitioner and a respondent before the highest state court[4].

Respondent is Donna C. Kline, also an attorney living and practicing law in the Houston, Texas area. She was the moving party in the arbitration[1]; the plaintiff in the trial court[2]; the appellant in the appellate court[3]; and both a petitioner and a respondent in the highest state court[4].

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[1] Case No. 70 194 0030 91 W before a Commercial Arbitration Tribunal of the American Arbitration Association, styled "In the Matter of the Arbitration between Donna C. Kline - and - John M. O'Quinn & Thomas J. Pearson." *See* Appendices G and H to Petition for Writ of Certiorari. (Respondent will employ the two-volume Appendix filed by Petitioner for Appendices A through P.)

[2] Cause No. 91-009787 in the 280th Judicial District Court of Harris County, Texas, styled "Donna C. Kline v. John M. O'Quinn, Thomas J. Pearson, and BankOne, N.A." *See* Appendix F.

[3] Case No. A14-93-00187 in the Texas Fourteenth Court of Appeals, styled "Donna C. Kline v. John M. O'Quinn, Thomas J. Pearson, and BankOne, N.A." *See* Appendices A, B and C.

[4] Case No. 94-0780 in the Supreme Court of Texas, styled "John M. O'Quinn v. Donna C. Kline." *See* Appendices D and E.

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OPINIONS AND JUDGMENTS BELOW

The "Opinions Below" section of the Petition tracks each decision below but takes one liberty. The Petition refers to the decision shown in Appendix H thereto as "The Arbitrators' *Denial of Petitioner's Motion to Partially Modify and Vacate Arbitration Award.*" No document bears that name. The decision shown at Appendix H refers to itself as an "Award of Arbitrator(s)." The distinction is not trivial.

One of the Petitioner's problems is that he chose to submit to the Arbitrators the same challenges to their first Award (shown at Appendix G) which he later presented in court. The Petitioner is now aggrieved by the second Award more than the first, yet he presents no constitutional or other challenge to it. Petitioner's creation of a new title for the second decision should not obscure this infirmity.

OBJECTION TO JURISDICTION

The writ of certiorari in this case is sought against the decision of the Texas Fourteenth Court of Appeals. *See* Appendix A. That court dealt with Mr. O'Quinn's due process arguments without reaching their merits. It correctly held that Mr. O'Quinn did not raise any due process argument (except lack of notice) before the trial court. *See* Appendix A, p. A-12. Mr. O'Quinn feebly addresses this point at pages 24-27 of his Petition.

In his first argument (at Petition, pages 25-26) he tries to convince this Court that the Texas court incorrectly applied Texas rules regarding preservation of error, a point this Court should not reach in the absence of an argument that Texas procedure for preserving error is itself unconstitutional.

His second argument (at Petition, pages 26-27) contends that his due process points were all set out below. The Petition understandably neglects to quote the passages which it argues salvage the points. Respondent invites this Court to search the passages cited by Petitioner (paragraph 9 of Appendix O and paragraphs 10-13 and 21 of Appendix P) for any such due process point. They are not there.

The waiver occurring below has jurisdictional implications here now. *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975).

STATEMENT OF THE CASE

Respondent perceives material misstatements of fact within Petitioner's Statement of the Case and within the Petition generally. Respondent offers these corrections:

The Petitioner's Statement of the Case opens with a stunningly misleading statement when it says, "This dispute arises out [sic] the arbitration of a contract dispute among lawyers over the allocation of contingent fees from various lawsuits or cases." (emphasis in original) The case below, both in arbitration and in court, was never limited to "contract" disputes. It always involved breach of trust. The agreement between these parties expressly required that any moneys recovered would be held by Mr. O'Quinn in trust for accounting and distribution. The money was in fact received by Mr. O'Quinn into a trust account. Ms. Kline steadfastly complained of the violation of the trust duties thus accepted by Mr. O'Quinn.

Ms. Kline's pleadings always sought "such other and further relief, whether at law or in equity, whether general or special, to which she may show herself entitled" and always prayed for "general relief." This was never just a contract case against Mr. O'Quinn. It was never a case in which Ms. Kline "did not seek punitive damages," as asserted in the second sentence of the Petitioner's Statement of the case. We note that there is no complaint in the Petition before this Court to the effect that the procedures of the American Arbitration Association or the Texas courts deny parties a right to flesh out their opponents' general pleadings.

This is a case in which Mr. O'Quinn received into trust (a fiduciary relationship) millions of dollars. The root problem was not the "allocation" of the money, as euphemistically suggested in the first sentence of Petitioner's Statement of the Case. The root problem was that Mr. O'Quinn, the trustee, paid out to himself individually **all** of Ms. Kline's share of the recoveries. Her "allocation" by Mr. O'Quinn was zero. He breached his trust, as the arbitrators manifestly concluded based on the record before them.

REASONS FOR DENYING THE PETITION

Logically, all of Petitioner's arguments can be divided into two groups: one argument which would not depend upon a review of the full record in this particular case and other arguments which would.

I. THE DUE PROCESS CLAUSE DOES NOT BAR ALL ARBITRATION AWARDS OF PUNITIVE DAMAGES IN ALL CASES.

Part I of the Petition (at pages 9-16) argues that no award of punitive damages in an arbitration can ever survive a challenge under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Of course, no prior decision of this or any other court says any such thing. The Petition wistfully suggests (at page 15) that perhaps no one previously thought to raise such an argument. If that is true, it is understandable.

Whatever standards of review are required for punitive damage awards can just as easily be applied to an arbitration proceeding as to a jury trial (assuming the complaining party bothers to have a record made of the proceeding).

Unlike *Honda Motor Co. v. Oberg*, 114 S.Ct. 2331 (1994), this case does not present a state statute or rule of decision which prohibits judicial review of the amount of a punitive award. Unlike *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), this case does not involve the validity of legal instructions for restraining lay jury awards. Unlike *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993), this case does not raise any issue of excessive magnitude of a punitive award. What petitioner seeks to raise is an issue of how judicial review of an arbitration award can be exercised so as to ensure Due Process compliance.

Assuming *arguendo* that such review is necessary[5], it can be performed the same way it is in a jury case. This begins by reviewing the complete record of the challenged proceeding. Of course, that cannot be done in this particular proceeding because neither Mr. O'Quinn nor anyone else saw fit to have a record made. *Cf.* Appendix A, p. A-11. But that does not mean that all punitive damage awards in all arbitrations must be set aside.

Under Texas law, when a party agrees to arbitrate all of her "disputes" or "controversies" arising out of business dealings, this includes claims for punitive damages. *USX Corp. v. West*, 781 S.W.2d 453, 455 (Tex. App.--Houston [1st Dist.] 1989, *orig. proceeding*). The parties to this case contracted with reference to Texas law, as the Petition concedes.

This case, accordingly, does not fairly present the difficult question implied in Petitioner's leading argument. That question, restated, is: When a party with a punitive damage claim has agreed to arbitration, must there be two trials -- one in the arbitration on everything but the punitive damage claim and one in court on just the punitive damage claim?

If, under the Due Process Clause, no arbitration award of punitive damages can even be affirmed, this Court need not have bothered deciding *Mastrobuono v. Shearson Lehman Hutton*, 115 S.Ct. 1212 (1995), as it did. The contractual analysis that case gives to the contracting parties'

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[5] The Arbitrators in this case were all experienced civil trial lawyers.

intent regarding punitive damages could have been avoided altogether if this Petitioner is right. Applying the pro-arbitration policy of the Federal Arbitration Act to a case of punitive damages would lose all meaning if the Act is unconstitutional in this regard.

That punitive damages should be assessed by arbitrators instead of jurors is not fundamentally at odds with the Due Process Clause.

II. IN THE ABSENCE OF A COMPLETE RECORD, THIS CASE CANNOT BE FAIRLY DECIDED ON PETITIONER'S OTHER POINTS.

In Texas, the courts say:

> We should not say to defaulting fiduciaries that the most for which they can be held accountable in equity are the profits which would have remained theirs had they not been called into account.

International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 584 (Tex. 1963). The Petitioner here nonetheless submits that he should not be subject to punitive damages in this particular case because:

A. The arbitration agreement between these parties did not expressly refer to punitive damages. (*See* part II of Petition at pp. 16-20); or

B. Mr. O'Quinn had no notice that he was at risk of a punitive damage award in the arbitration (*see* part III of the Petition at pp. 20-23).

These very issues were submissible to the arbitrators after their Award. *See* Appendix H, the Second Award of Arbitrator(s) denying Mr. O'Quinn's post-Award motion. The Petitioner does not even claim that there is a constitutional defect undermining the disposition by the arbitrators of the challenges Mr. O'Quinn chose to present to them first.

When the Petition says that "[i]t appears" that something happened in the arbitration (*see* Petition, p.22). The Court should be alert to what is missing -- record references. The Texas Fourteenth Court of Appeals was well aware of the difficulties this presented, for it repeatedly noted in its opinion the lack of a record of the arbitration filings and evidence. *See* Appendix A, pp. A-7, A-9, A-11. The appellate court's opinion defers to the arbitrator's decision not just because Texas law calls for them to do so[6], but also because they had no choice in the absence of a record. This Court is in no better position, for the record has not suddenly materialized.

Respondent could, if she chose, disagree here with the Petitioner's assertions regarding when punitive damages were first specifically made an issue in the arbitration; or whether discovery in the arbitration was "abbreviated;" or whether the rules of evidence were "relaxed' in this particular arbitration. Yet this Court will have no way ever of knowing.

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[6] *Riha v. Smulcer*, 843 S.W.2d 289, 293-94 (Tex.App. -- Houston [14th Dist.] 1992, *no writ*); *Bailey v. Williams*, 727 S.W.2d 86, 90 (Tex.App. -- Dallas 1984, *writ ref'd, n.r.e.*).

This makes this particular case a poor vehicle for reaching constitutional questions of the sort raised in the Petition.

CONCLUSION

The Petition for Writ of Certiorari of John M. O'Quinn should be denied.

Respectfully submitted,

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